STATE OF MICHIGAN
SUPREME COURT

Appeal from the
Court of Appeals Docket No: 234065

Supreme Court # 119889
Court of Appeals # 234065
Circuit Court # 00-1304-AR-C
District Court # 00-4070-FY-L

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

v

DONNA ALICE YOST,

Defendant/Appellant

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Attorney for Plaintiff/Appellee

BAY JUSTICE ASSOCIATES, P.C.
By: Edward M. Czuprynski (P34114)
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REPLY BRIEF OF DEFENDANT-APPELLANT

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I

PLAINTIFF-APPELLEE DOES NOT SEPARATE THE TWO INQUIRIES REQUIRED OF A MAGISTRATE AT A PRELIMINARY EXAMINATION.

In its discussion of the ultimate propriety of the District Court's refusal to bind Donna Yost over, Plaintiff fails to maintain the distinction between the two inquiries made by that Court. It repeatedly invokes the "probable cause" standard as relatively lenient, suggesting that the Court erred in not finding that the standard had been met. It also devotes a great deal of attention to evidence which does not address the question whether Monique Yost was given the medication by another person but only serves to (allegedly) indicate Donna's guilt.

As pointed out in Defendant's main Brief, however, the statutory language and all the decisional authority recognize *two* inquiries -- whether the offense was committed and whether there is probable cause to believe the accused was the person who committed it -- and under the better reasoned authority, the "probable cause" standard applies only to this second inquiry. *See*, *People* v *Asta*, 337 Mich 590; 60 NW2d 472 (1953). The District Court found insufficient evidence that the crime was committed to begin with, based upon a lack of real evidence that anyone other than Monique herself had given her the Imipramine. Plaintiff's argument that the Court was required to consider the supposed motive evidence and apply the "probable cause" standard serves only to confuse matters.

Plaintiff argues, however, that motive evidence can be offered to show the "elements" of the offense, citing *People* v *McClure*, 29 Mich App 361; 185 NW2d 426 (1971); *lv den*, which

does not actually so hold. Defendant submits that this proposition applies primarily to the *mens rea* elements, rather than to the occurrence of the underlying act. And it should certainly not apply where the "motives" and the "suspicious behavior" are as suppositious and speculative as they are in the instant case. Plaintiff argues that Monique's death must have been a homicide because her mother had punished her for running off earlier in the day, because she did not wait for the lab reports before concluding that the Imipramine was the cause of death, or because she was distraught that her own lack of supervision may have contributed to her daughter's death. If it were clear that Monique had met with foul play, this sort of evidence might indicate her mother's involvement -- though only very weakly -- but it does not tend to make the child's death a homicide.[1]

Defendant asks this Court to keep the separation between the two inquiries in mind when evaluating the evidence the District Court had before it. The evidence that a crime occurred in the first place was very thin, consisting almost entirely of Dr. Virani's highly questionable expert opinions, and the District Court did not abuse its discretion in finding it insufficient.

[1] *Quaere*, if A and B have a quarrel, and B is killed in an apparent hit-and-run traffic accident, can A be brought to trial for murder -- despite a complete lack of evidence that anything but an accident occurred or that A was involved in any way -- merely because the quarrel arguably gave him a motive?

II

PLAINTIFF-APPELLEE ADDRESSES ONLY VERACITY DETERMINATIONS IN STATING THE PROPER ROLE OF THE MAGISTRATE IN EVALUATING THE CREDIBILITY OF WITNESSES.

Plaintiff does not dispute that the magistrate has a role to play in evaluating the "credibility" of witnesses at a preliminary examination, but it would limit that role too severely. Essentially, Plaintiff argues that the magistrate must accept all testimony unless the witness is obviously lying. This limitation is not helpful in the instant case, where the critical evidence consisted of expert testimony disregarded in large part because the witness was offering opinions outside his own area of expertise.

As set forth at length in Defendant's main Brief, no one is actually questioning the *veracity* of Dr. Virani at this point. The District Court evidently believed him when he testified that he performed an autopsy on Monique's body, that he failed to find solid pill residue in her stomach, and that the levels of Imipramine found by the lab test would be lethal, suggesting that "acute Imipramine intoxication" was the cause of death. The Court was unwilling to follow him, however, when he offered *opinions* that the absence of solid residue means that someone ground up the pills to mix with a drink and that small children are incapable of committing suicide. Determining the competency of expert testimony is a function of the court, *e g*, *People* v *Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and the District Court cannot reasonably be found to have abused its discretion in refusing to accept the witness's opinions under these circumstances.

Plaintiff's proffered principle, under which the only question is whether Dr. Virani was *lying*, is not suited to the facts of this case. It does not permit the magistrate to deal with

situations where the prosecutor does not have any evidence which the magistrate would be willing to place before the jury in an actual trial. And it leaves too wide a scope for a prosecutor to bolster an ultimately insufficient case with speculations and incompetent opinions in the guise of "expert testimony." Wherever this Court chooses to draw the line, it should take the special problem of expert testimony into consideration.

III

PLAINTIFF-APPELLEE ARTICULATES THE CORRECT STANDARD OF REVIEW, BUT THE CIRCUIT COURT DID NOT FOLLOW IT.

Plaintiff agrees with Defendant that the proper standard of review in the Circuit Court was "abuse of discretion," and that subsequent appeals, such as the instant one, are to be decided *de novo*. Plaintiff also concedes that the District Court had at least some discretion with respect to judging the credibility of the evidence before it -- even though the parties disagree as to how much that was. Plaintiff then, however, characterizes bindover in the face of "conflicting evidence" as a "clear legal duty," refusal of which is a *per se* abuse of discretion calling for, in effect, automatic reversal.

This has the effect of removing the "discretionary" character of the magistrate's determination, which has been recognized in every authority presented by either of the parties. To say that the bindover decision is "discretionary" is to say that there is a class of cases in which the decision could validly go either way -- in which one qualified observer would be inclined to grant bindover while another would not. But to say that a magistrate is *obliged* to bind the accused over whenever there is any evidence in support of the prosecutor's position -- without regard to the quality of that evidence -- is to say that there is one "right answer" to the

bindover decision. This, in effect, eliminates the role of the magistrate in evaluating evidence which Plaintiff has allegedly conceded. It also brings *de novo* review of the initial bindover decision in through the back door.

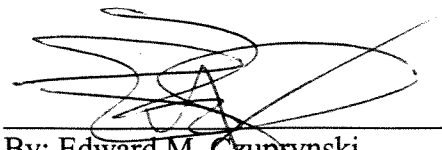
This Court must remain focused on the question before it. A little girl died under circumstances which cannot be fully reconstructed and probably never will be. This is beyond question a heart-wrenching tragedy -- for no one more so than Donna Yost herself -- but there is *no real evidence* that anything other than an accidental or self-inflicted poisoning occurred. Plaintiff tried to stretch out its preliminary examination case with speculation and innuendo, but there was *still no evidence*. The District Court looked at what had been presented and said, "This is not enough." This was not "acting as a factfinder" or "usurping the role of the jury." The Court simply evaluated the sufficiency of the evidence and found it wanting. That was its job. The question on appeal -- both in the Circuit Court and here -- is whether the District Court was ignoring its duty and behaving in a totally unjustified way.

It was not.

PRAYER FOR RELIEF

WHEREFORE, Defendant-Appellant DONNA ALICE YOST respectfully prays that this Honorable Court reverse the Order of the Circuit Court and reinstate the decision of the District Court not to bind her over for trial.

Respectfully submitted,
BAY JUSTICE ASSOCIATES, P.C.



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Dated: July 3, 2002